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Supreme Court, U.S.
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No. 95-1746

In The

Supreme Court of the United States

October Term, 1995

MICHAEL D. LONGSHORE, Individually and on behalf of all others similarly situated,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONERS' REPLY MEMORANDUM

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The user fees imposed upon cellular radio applicants are classic user fees designed to recoup the cost of regulation thus falling within the purview of this Court's decision in *United States v. Sperry*, 493 U.S. 52 (1989). *See* H.R. 99-300, 99th Congress 2d Sess. 506, U.S. Code Cong. & Admin. News 1986, p. 1021 (the FCC's user fees are "based on [the] cost of regulation"). *See also* H.R. 101-247, 101st Congress 1st Sess. 546 (1988), U.S. Code Cong. & Admin. News 1988, p. 2267 ("retaining a fee structure that is based on the cost of regulation" when amending 47 U.S.C. § 158).

Ignoring the clear legislative history of the statute implementing the user fees at issue, the Government attempts to recast Longshore's complaint as arguing that the takings clause limits Congress with respect to the amount of money Congress can charge for the value of a cellular license. *See* Brief at 6 (describing the amount of the fee as a "pre-determined price" for a "lottery chance" to win a cellular radio license). The Government's gambit is unavailing. As the Federal Communications Commission ("FCC") has acknowledged, the user fees established by Congress for filing cellular applications were not designed or intended to be a charge for the value or use of the spectrum but, rather, were designed to recoup the costs of providing a government service to specific users. *Practice and Procedure: Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Notice of Proposed Rulemaking*, 51 Fed. Reg. 25792, 25795 (¶ 26) and at n. 31 (July 16, 1986); S. Hrg. 99-66, at 11.

The Government describes the cellular radio licensee lottery conducted by the FCC as "an arms length transaction" between the applicant and the Government which cannot constitute a taking. Brief at 6. There is nothing "arms length" about a transaction between a citizen and a government acting within its sovereign capacity. Longshore had no choice but to participate in the cellular lottery on the terms established by the Government if he wanted to apply for a cellular license. Under such circumstances, the doctrine of "unconstitutional conditions" precludes Longshore from being forced to forfeit constitutional rights, including the protections afforded by the takings clause, in exchange for participating in the cellular lottery on the terms set by the Government. *Dolan v. City of Tigard*, ___ U.S. ___, 129 L.Ed.2d 304, 316 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit").

The Government urges that Longshore's "grievance, in essence, is that he made a bad decision when he voluntarily paid an allegedly unreasonable price for a chance to participate in the cellular service lottery." Brief at 6-7. The Government's voluntariness argument is wholly without merit for two reasons. First, Sperry voluntarily used the Iran-United States Claims Tribunal:

> ***Appellees voluntarily invoked the jurisdiction of the Tribunal by filing their claim,*** and even after appellees agreed to a settlement with Iran,

> they did not bypass the claims-settlement apparatus by making arrangements for direct payment by Iran, ***as they were free to do.*** (Emphasis supplied.)

See Government's Brief in *Sperry,* at p. 20.[1]

Despite Sperry's voluntary use of the pertinent government service, the Court set forth a user fee takings test which a party must pass "before we conclude that the [user fees] are actually takings." *Sperry,* 493 U.S. at 60. If the Government's voluntariness argument were valid, the *Sperry* Court would not have bothered setting forth the user fee takings test and making a determination as to whether Sperry passed that test.[2]

Second, when faced with the prospect of submitting to an exaction or not doing business, "money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria.*" *Swift v. United States,* 111 U.S. 22, 28 L.Ed. 341, 343 (1884). *See also Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320, 329 (1909). Thus, Longshore was not stuck with a "take it or leave it" proposition. He can pay the fee and then protest that it

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[1] Sperry decided to use the Tribunal sometime after July 8, 1982 (493 U.S. at 56) while the fee was imposed on June 7, 1982. *Id.* at 57. Thus, while the imposition of the fee was retroactive with respect to some of the users of the Tribunal, the fee was not retroactive with respect to Sperry. *See* Brief at note 4.

[2] The fact that Sperry did not pass the user fee takings test has no bearing whatsoever on the applicability of the test in the instant case as the Government apparently contends. *See* Brief at note 4 ("Moreover, in *Sperry,* this Court upheld imposition of the fee.")

was an unconstitutional or illegal exaction. *Clapp v. United States*, 127 Ct.Cl. 505, 515 (Ct.Cl. 1954), *cert. denied*, 348 U.S. 834 (1954).

The importance and substantiality of the question presented have not been denied. Because this case presents a classic user fee situation to which the takings clause is applicable per this Court's decision in *Sperry*, Longshore suggests that summary reversal is in order.

Respectfully submitted,

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